

NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI
Company Appeal (AT) (Insolvency) No. 1659 of 2024

[Arising out of the Order dated 05.06.2024, passed by the 'Adjudicating Authority' (National Company Law Tribunal, New Delhi, Court-II), in IA No. 4356/2023 filed in CP (IB) No. 505/ND/2022]

IN THE MATTER OF:

1. M/S PROPERTREE REAL ESTATE SOLUTIONS PRIVATE LIMITED
A - 202, NEEL PADAM KUNJ, SECTOR - 1,
VAISHALI, GHAZIABAD - 201010 UTTAR PRADESH

...Appellant

Versus

1. MR. A. VISWANADHA SARMA RESOLUTION PROFESSIONAL
M/S UNIBERA DEVELOPERS PRIVATE LIMITED, DELOITTE INDIA INSOLVENCY PROFESSIONALS LLP 7th FLOOR.
BUILDING 10, TOWER B,
DLF CYBER CITY, PHASE II,
GURGAON, HARYANA - 122002
Email : cirp.unibera@gmail.com

...Respondent

Present:

For Appellant : Mr. G. P. Madan, Mr. Raghav Sharma, Mr. Jaskirt Pal Singh, Mr. Prabhav Pachory, Advocates.
For Respondent : Mr. Sumesh Dhawan, Ms. Vatsala Kak and Mr. Sagar Thakkar, Advocate for RP.

With
Company Appeal (AT) (Insolvency) No. 1660 of 2024

[Arising out of the Order dated 05.06.2024, passed by the 'Adjudicating Authority' (National Company Law Tribunal, New Delhi, Court-II), in IA No. 4354/2023 filed in CP (IB) No. 505/ND/2022]

IN THE MATTER OF:

1. MRS. VANDANA GUPTA
W/O MR ARUN GUPTA R/O 1009, TOWER SEM-B, SHIPRA SRISHTI APARTMENTS,
INDIRAPURAM, DIST - GHAZIABAD UTTAR PRADESH - 201014

...Appellant No. 1

**2. MR. ARUN GUPTA
S/O LATE SHRI SURESH CHAND GUPTA
R/O 1009, TOWER SEM-B, SHIPRA
SRISHTI APARTMENTS, INDIRAPURAM,
DIST -GHAZIABAD
UTTAR PRADESH- 201014**

...Appellant No. 2

Versus

**1. MR. A. VISWANADHA SARMA
RESOLUTION PROFESSIONAL
M/S UNIBERA DEVELOPERS PRIVATE
LIMITED, DELOITTE INDIA INSOLVENCY
PROFESSIONALS LLP 7th FLOOR,
BUILDING 10, TOWER B, DLF CYBER CITY,
PHASE II, GURGAON, HARYANA - 122002
Email : cirp.unibera@gmail.com**

...Respondent

Present:

For Appellant : Mr. G. P. Madan, Mr. Raghav Sharma, Mr. Jaskirt Pal Singh, Mr. Prabhav Pachory, Advocates.

For Respondent : Mr. Sumesh Dhawan, Ms. Vatsala Kak and Mr. Sagar Thakkar, Advocate for RP.

J U D G M E N T
(Hybrid Mode)

[Per: Justice Mohd. Faiz Alam Khan, Member (Judicial)]

Both above appeals are connected with each other and the two IA's filed by the appellants before the Tribunal have also been disposed of by passing a common impugned order of date 05.06.2024, thus for the sake of convenience both appeals are being disposed of by passing this common order.

2. CA (AT) (Ins) No. 1660 of 2024 has been preferred by the appellants who are the Directors of M/s Propertree Real Estate Solutions Pvt. Ltd. under Section 61 (1) of the IBC, 2016 against order dated 05.06.2024 passed by the National Company Law Tribunal, New Delhi, Court No. II in IA

No. 4354 of 2023 filed in CP (IB) No. 505/ND/2022, against the impugned order whereby the IA No. 4354 of 2023 pertaining to their claim of Rs. 81,05,211/- as Financial Debt has been rejected by the Tribunal.

3. CA (AT) (Ins) No. 1659 of 2024 has been filed by the M/s Propertree Real Estate Solutions Pvt. Ltd. against the same impugned order whereby the IA No. 4356 of 2023 moved by the appellant pertaining to the admission of its claim of Rs. 49,96,236/- to be treated as financial debt has been rejected by the Tribunal.

4. Brief facts necessary for the disposal of the aforesaid both appeals are that M/s Unibera Developers Pvt. Ltd. were subjected to CIRP on an application moved by an operational creditor M/s Mahi Build Home Pvt. Ltd. under Section 9 of the IBC vide order dated 13.01.2023 of the Tribunal.

5. During the process of CIRP the claims were collated by the IRP and the appellants before us have raised separate claims of Rs. 81,05,211/- and Rs. 49,96,236/- as financial debt however the said debt has been treated as operational debt by the IRP and in this background above mentioned both applications namely IA No. 4354 of 2023 and 4356 of 2023 were moved by the appellants before the Tribunal with the prayer to treat the claim of the appellants for the above mentioned amount as financial debt. The tribunal, however by passing the impugned order rejected both above mentioned applications of the appellants and aggrieved by the same the instant appeals have been preferred by the appellants.

Case of the Appellants

6. The case of the appellants as is reflected from the pleadings are in terms that appellant's in CA (AT) (Ins) No. 1660 of 2024 are the Directors of

a Company namely, M/s Propertree Real Estate Solutions Pvt. Ltd. and they were approached by the Corporate Debtor on the premise that a residential project of the Corporate Debtor in the name of M/s Unibera Developers Pvt. Ltd. is coming up and thus a request was made by the CD to the Company of the appellants to become their authorised broker for that upcoming project and the appellants also agreed to purchase a residential flat for itself for a consideration of Rs. 33,75,600/- plus applicable taxes etc.

7. It is further the case of the appellant that relying on the promises and assurances of the CD they deposited amount of Rs. 50,000/- towards the booking amount and booked a 3 BHK, unit bearing no. 201, on 2nd Floor of Tower-IV measuring 1385 sq. ft. and receipt dated 30.05.2012 was issued accordingly, however, subsequently the name of the project was changed from 'Unibera Towers' to 'Unibera Heights' and in the meantime the appellants through their company further paid Rs. 1,50,000/- including tax through cheque of date 20.06.2013 pertaining to which also a receipt dated 29.06.2013 was issued accordingly.

8. It is also the case of the appellants that the layout of the CD and its unit sizes changed and thereafter, unit no. 1204 having an area of 1455 sq. ft. in Tower-V of the project was allotted to the Appellant Company and Rs. 33,75,600/- which were due as brokerage on CD were adjusted towards the consideration of the said unit and a builder buyer agreement was also executed on 10.09.2013. The CD was supposed to handover the unit to the appellant within a period of 36 months from the date of execution of that agreement.

9. The appellants case as further stated by them is that the appellant kept acting as authorised broker of the CD and have sold several units as a result of which the CD owed liability of commission which was due and payable in favour of the appellant company and with regard to this, two separate credit notes of Rs. 5,74,800/- and Rs. 10,69,585/- of date 10.03.2015 and 02.07.2015 were issued by the CD towards the allotted flat/units against the part adjustment of the commission/brokerage payable by the corporate debtor to the appellant company. Thus, amount of Rs. 15,05,580/- stood paid by the Company to the Corporate Debtor towards the consideration of this flat/unit and in this way total amount of Rs.17,05,580/- stood paid by the CD towards the consideration of the flat/unit to the CD.

10. It is also stated by the appellants that the appellants company sold about 101 flats and with regard to the Commission of the same have raised an invoice of Rs. 99,77,449/- on 01.10.2016. However, neither the possession of the flat was given to the appellants nor his dues were paid and it was on 07.06.2017 the CD arbitrarily and illegally cancelled the allotment of flat/unit earlier allotted to the appellant Company.

11. It is also the case of the appellant that the appellant company issued a demand notice to the corporate debtor demanding payment of the due amount of Rs. 1,16,83,299/-(Rs. 99,77,449/- as brokerage commission +Rs. 17,05,850/- on account of refund for cancelling the unit) and when the same was not paid an application under Section 9 of the IBC was moved by the appellant company for default of Rs. 1,16,83, 299/- and the Ld. NCLT, New Delhi vide order dated 12.11.2021 admitted the same and the CIRP was

commenced against the CD and Mr. Anil kumar Mittal was appointed as the IRP.

12. It is also stated by the appellants that after the commencement of the CIRP Suspended Directors of the Corporate Debtor approached the appellants with a request to amicably settle the matter and to pay Rs. 1 crore fifty lakhs as full and final settlement of all claims of the Company towards the Company Debtor and in this regard a MoU dated 25.11.2021 was executed between the Suspended Directors of the CD and appellant Company and a schedule of payment was agreed and in consequence of the same some post-dated cheques were also issued and further a joint application was filed for withdrawal of the CIRP before the Adjudicating Authority. However, on its dismissal appeals were filed before this appellate Tribunal and vide order dated 07.12.2021 the CIRP process was stayed.

13. It is also stated by the appellants that since the terms of the MoU were not followed by the CD another MoU dated 03.02.2022 amending the terms of the MoU dated 25.11.2021 was executed between the parties detailing the terms and conditions of the settlement and the Appellate Tribunal vide order dated 08.02.2022 set aside the order dated 01.12.2021 of the Tribunal, as a result of which the CIRP of the CD was withdrawn.

14. It is further the case of the appellant that after execution of MoU dated 03.02.2022 a new flat/unit bearing no. T-V 2301 in Unibera tower Project of the CD was allotted and a builder buyer agreement was also executed on 16.02.2022 in favour of the appellants for a total amount of Rs. 74, 98,738/- and the CD also issued Credit note for Rs. 74,98,738/- including tax and also a receipt of the same dated 19.02.2022 and a letter

dated 19.02.2022 was also issued showing the adjustment of the amounts due on the CD. The CD however, did not deliver the possession of the allotted flats to the appellants and appellant along with other 102 homebuyers filed a Company Petition bearing CP IB No. 642 of 2022 under Section 7 of the IBC however during the pendency of the said petition the CIRP of the CD commenced vide order dated 13.01.2023 of the NCLT and Mr. Ashok Kumar Jalan was appointed as the IRP. In pursuance of the publication of Form A appellants submitted their claims in form CA on 23.01.2023 for an amount of Rs. 81,05,211/- and after exchange of various emails with the IRP the appellant was included in the list of financial creditors with 0.44% voting share, however on 14.07.2023, after about more than four months, the newly appointed Resolution Professional informed via email that the claim of the appellant cannot be considered under Form CA i.e. as a financial creditor in class of homebuyer/allottee and when the claim of the appellant was not found favour by the IRP the appellants moved aforementioned two applications before Adjudicating Authority which stands rejected by the above mentioned impugned orders of the Tribunal.

Case of Respondent

15. The case of the Respondent as is reflected from his reply is that the appellant was engaged by the CD as an authorised broker for its residential project called “Unibera Towers” (previously known as “Unibera Heights”) and in the same year CD has allotted them a unit in the said project on the appellant having paid an amount of Rs. 50,000/- and Rs. 1,50,000/- respectively on 10.09.2013.

16. It is also the case of the Respondent that the appellant continued to provide brokerage services to the CD and had raised an invoice for a total amount of Rs. 99,77,449/- on 01.10.2016 thus the transaction between the parties was in the nature of operational debt. It is also contended that as the appellant failed to pay further money towards allotment of the unit to the CD, the CD vide letter dated 07.06.2017 cancelled the allotment made in favour of the appellant.

17. It is also stated that on 21.05.2018, the appellant issued a demand notice for an amount of Rs. 1,96,25,503/- and filed an application under Section 9 of the IBC before the Tribunal which was admitted vide order dated 12.11.2021 which also shows that it was admitted to the appellant that transaction between the parties is in the nature of operational debt.

18. It is also stated by the Respondent that aggrieved by the aforesaid order of the Tribunal the Suspended Director of the CD had filed an appeal bearing CA (AT) (Ins) No. 950 of 2021 before this Tribunal and during the pendency of the appeal the parties entered into a settlement dated 25.11.2021 (23.11.2021) and on the basis of this settlement a joint application was moved before the Adjudicating Authority seeking withdrawal of the CIRP which was dismissed vide order dated 01.12.2021 and against the said order an appeal bearing CA (AT) (Ins) No. 1023 of 2021 was preferred to this Appellate Tribunal. In terms of the settlement arrived at between the parties the CIRP process stood withdrawn in pursuance of the order of this Appellate Tribunal dated ..

19. It is also the case of the Respondent that vide settlement dated 25.11.2021 as amended on 03.02.2022, it was settled between the parties

that an amount of Rs. 1,75,00,000/- shall be paid to the appellant by the CD and in pursuance of the same Rs. 25,00,000/- and Rs. 30,00,000/- were paid to the appellant and for the rest of the balance amount i.e. 1,25,00,000/- two units namely Unit No. 1204 in Tower No. -5A, Unibera Tower and Unit bearing No. T-5, 2301 in the same project were allotted to the appellant company.

20. It is further the case of the Respondent that no Builder Buyer Agreement was signed with regard to Unit 1204 in Tower-5A and the Builder Buyer Agreement dated 10.09.2013 had already been cancelled on 07.06.2017 by the CD and the underline transactions between the parties were of the nature of supply of services and was thus the debt due on CD was of the nature of operational debt.

Submissions of Ld. Counsel for the parties

21. We have heard Ld. Counsel for the parties and have perused the record as well as the written submissions filed by them.

22. Ld. Counsel for the appellant submits that as one of the unit was allotted to the appellant by the CD after taking Rs. 50,000/- and Rs. 1,50,000/- pertaining to which the receipts were also issued, the appellant for all purposes are the homebuyers/allottees and keeping in view the amended definition of the financial creditor as provided under Section 5(8) (f) of IBC they are allottee of a real estate project and financial creditor and this has been overlooked by the tribunal.

23. It is also submitted that builder buyer agreement was also executed on 10.09.2013 between appellants and CD and two receipts in partial settlement of the brokerage amount were also issued by the CD of the

amount of Rs. 5,74,800/- and Rs. 10,69,585/- and this amount was adjusted as a consideration of the above mentioned unit. It is also submitted that earlier on 17.05.2018 a demand notice was issued to the CD for payment of Rs. 1,96,25,503/- and on failure to pay the same a petition under Section 9 of the IBC was filed which was also allowed however the dispute was settled by entering into a MoU dated 25.11.2021 which was amended on 03.02.2022 and on the basis of this settlement the CIRP process was culminated by this Appellate Tribunal. It is also submitted that by virtue of MoU dated 25.11.2021 as amended on 03.02.2022 about Rs. 50 lakhs were paid to the appellant by the CD and remaining Rs. 1,25,00,000/- were adjusted as consideration of the two flats stated therein. Thus appellants are included in the definition of allottee under a real estate project and are financial creditors.

24. It is vehemently submitted that initially the claim of the appellant was treated as financial debt and the appellant was also attending the meetings of the CoC however later on the RP informed that the claim of the appellant is of the nature of operational debt.

25. It is submitted that the RP as well as the Tribunal have committed manifest illegality in not appreciating the fact that the amount due on the CD as brokerage was adjusted as a consideration for the two flats and therefore for all purposes the appellant was a financial creditor in view of the amended definition of homebuyer as defined under Section **5(8)(f)** of the IBC.

26. Reliance has also been placed by Ld. Counsel for the appellant on **“Vidarbha Industries Power Ltd. vs. Axis Bank Ltd.”** in Civil Appeal no. 4633 of 2021 decided on 12.07.2022.

27. Ld. Counsel appearing for the Respondent while relying on the law laid down by Hon’ble Supreme Court Judgments in **“Pioneer Urban Land and infrastructure Ltd. & Anr. vs. Union of India & Ors.”** (2019) 8 SCC 416. **“Anuj Jain, Interim Resolution Professional for Jaypee Infratech Ltd. vs. Axis Bank Ltd. & Ors.”** (2020) 8 SCC 401 and by this Appellate Tribunal in **Namdeo Ramchandra Patil vs. Vishal Ghisulal Jain**, bearing CA (AT) (Ins) No. 821 of 2021. **“Arenja Enterprise Pvt. Ltd. vs. Edward Keveter (Successors) Pvt. Ltd.** bearing CA (AT) (Ins) No. 528 of 2020 submits that neither RP nor the Tribunal has committed any error in treating the claim of the appellant as operational debt as the underline transactions was required to be seen and in this case as the unit allotted earlier was cancelled by the CD due to non-payment of balance money and thereafter only the amount due on the CD pertaining to the brokerage services rendered by the appellant was adjusted towards the consideration of 2 units (flats) allotted to the appellant in the project of the CD, the main transaction between the parties was of the nature of operational creditor and thus no illegality or to say any irregularity has been committed by the tribunal or RP. It is also highlighted that the appellant himself had filed an application before the tribunal under Section 9 of the IBC admitting himself as operational creditor and thus the appellant is ‘estopped’ from changing his stance by virtue of the principle of ‘estoppel’.

Analysis and Discussion

28. Having heard Ld. Counsel for the parties and perused the record. We think it better to recollect the law on the subject before adverting to the factual matrix put forth by the parties.

Section 5(8) of the Code which is relevant for the present case and is reproduced as follows: -

“5(8) "financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes—

- (a) money borrowed against the payment of interest;*
- (b) any amount raised by acceptance under any acceptance credit facility or its dematerialised equivalent;*
- (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;*
- (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;*
- (e) receivables sold or discounted other than any receivables sold on nonrecourse basis;*
- (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;*

[Explanation. -For the purposes of this sub-clause,-

- (i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and*
- (ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]*
- (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;*
- (h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;*
- (i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in subclauses (a) to (h) of this clause;”*

We may now also notice the definition of ‘allottee’ under the RERA Act, 2016 as contained under Section 2(d):-

“2(d) “allottee” in relation to a real estate project, means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;

By an amendment made in the I&B Code by Act 26 of 2018, ‘allottees of real estate’ have also come within the definition of Financial Creditors. Explanation added in the Section 5(8)(f) is as follows: - “[Explanation. -For the purposes of this sub-clause, -

(i) any amount raised from an allottee under a real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and

(ii) the expressions, “allottee” and “real estate project” shall have the meanings respectively assigned to them in clauses (d) and (zn) of section 2 of the Real Estate (Regulation and Development) Act, 2016 (16 of 2016);]”

Hon’ble Supreme Court in **Pioneer Urban Land and Infrastructure Limited And Another Vs. Union of India And Others**, (2019)8 SCC 416

opined as under:

“42. It is impossible to say that classifying real estate developers is not founded upon an intelligible differentia which distinguishes them from other operational creditors, nor is it possible to say that such classification is palpably arbitrary having no rational relation to the objects of the Code. It was vehemently argued by the learned counsel on behalf of the petitioners that if at all real estate developers were to be brought within the clutches of the Code, being like operational debtors, at best they could have been brought in under this rubric and not as financial debtors. Here again, what is unique to real estate developers vis-à-vis operational debts, is the fact that, in operational debts generally, when a person supplies goods and services, such person is the creditor and the person who has to pay for such goods and services is the debtor. In the case of real estate developers, the developer who is the supplier of the flat/apartment is the debtor inasmuch as the home buyer/allottee funds his own apartment by paying amounts in advance to the developer for construction of the building in which his apartment is to be found. Another vital difference between operational debts and allottees of real estate projects is that an operational creditor has no

interest in or stake in the corporate debtor, unlike the case of an allottee of a real estate project, who is vitally concerned with the financial health of the corporate debtor, for otherwise, the real estate project may not be brought to fruition. Also, in such event, no compensation, nor refund together with interest, which is the other option, will be recoverable from the corporate debtor. One other important distinction is that in an operational debt, there is no consideration for the time value of money—the consideration of the debt is the goods or services that are either sold or availed of from the operational creditor. Payments made in advance for goods and services are not made to fund manufacture of such goods or provision of such services. Examples given of advance payments being made for turnkey projects and capital goods, where customisation and uniqueness of such goods are important by reason of which advance payments are made, are wholly inapposite as examples vis-à-vis advance payments made by allottees. In real estate projects, money is raised from the allottee, being raised against consideration for the time value of money. Even the total consideration agreed at a time when the flat/apartment is non-existent or incomplete, is significantly less than the price the buyer would have to pay for a ready/complete flat/apartment, and therefore, he gains the time value of money. Likewise, the developer who benefits from the amounts disbursed also gains from the time value of money. The fact that the allottee makes such payments in instalments which are co-terminus with phases of completion of the real estate project does not any the less make such payments as payments involving “exchange” i.e. advances paid only in order to obtain a flat/apartment. What is predominant, insofar as the real estate developer is concerned, is the fact that such instalment payments are used as a means of finance qua the real estate project. One other vital difference with operational debts is the fact that the documentary evidence for amounts being due and payable by the real estate developer is there in the form of the information provided by the real estate developer compulsorily under RERA. This information, like the information from information utilities under the Code, makes it easy for homebuyers/allottees to approach NCLT under Section 7 of the Code to trigger the Code on the real estate developer's own information given on its webpage as to delay in construction, etc. It is these fundamental differences between the real estate developer and the supplier of goods and services that the legislature has focused upon and included real estate developers as financial debtors. This being the case, it is clear that there

cannot be said to be any infraction of equal protection of the laws.

70. The definition of “financial debt” in Section 5(8) then goes on to state that a “debt” must be “disbursed” against the consideration for time value of money. “Disbursement” is defined in *Black’s Law Dictionary* (10th Edn.) to mean: “1. The act of paying out money, commonly from a fund or in settlement of a debt or account payable. 2. The money so paid; an amount of money given for a particular purpose.”

71. In the present context, it is clear that the expression “disburse” would refer to the payment of instalments by the allottee to the real estate developer for the particular purpose of funding the real estate project in which the allottee is to be allotted a flat/apartment. The expression “disbursed” refers to money which has been paid against consideration for the “time value of money”. In short, the “disbursal” must be money and must be against consideration for the “time value of money”, meaning thereby, the fact that such money is now no longer with the lender, but is with the borrower, who then utilises the money. Thus far, it is clear that an allottee “disburses” money in the form of advance payments made towards construction of the real estate project. We were shown the *Dictionary of Banking Terms* (2nd Edn.) by Thomas P. Fitch in which “time value for money” was defined thus: “present value: today’s value of a payment or a stream of payment amount due and payable at some specified future date, discounted by a compound interest rate of DISCOUNT RATE. Also called the time value of money. Today’s value of a stream of cash flows is worth less than the sum of the cash flows to be received or saved over time. Present value accounting is widely used in DISCOUNTED CASH FLOW analysis.” (emphasis supplied)

That this is against consideration for the time value of money is also clear as the money that is “disbursed” is no longer with the allottee, but, as has just been stated, is with the real estate developer who is legally obliged to give money's equivalent back to the allottee, having used it in the construction of the project, and being at a discounted value so far as the allottee is concerned (in the sense of the allottee having to pay less by way of instalments than he would if he were to pay for the ultimate price of the flat/apartment).

76. Sub-clause (f) Section 5(8) thus read would subsume within it amounts raised under transactions which are not necessarily loan transactions, so long as they have the commercial effect of a borrowing. We were referred to Collins English Dictionary & Thesaurus (2nd Edn., 2000) for the meaning of the expression “borrow” and the meaning of the expression “commercial”. They are set out hereinbelow:

“borrow. —vb 1. to obtain or receive (something, such as money) on loan for temporary use, intending to give it, or something equivalent back to the lender. 2. to adopt (ideas, words, etc.) from another source; appropriate. 3. Not standard. to lend. 4. (intr) Golf. To putt the ball uphill of the direct path to the hole : make sure you borrow enough.”

“commercial. —adj. 1. of or engaged in commerce. 2. sponsored or paid for by an advertiser: commercial television. 3. having profit as the main aim: commercial music. 4. (of chemicals, etc.) unrefined and produced in bulk for use in industry. 5. a commercially sponsored advertisement on radio or television.”

77. A perusal of these definitions would show that even though the petitioners may be right in stating that a “borrowing” is a loan of money for temporary use, they are not necessarily right in stating that the transaction must culminate in money being given back to the lender. The expression “borrow” is wide enough to include an advance given by the homebuyers to a real estate developer for “temporary use” i.e. for use in the construction project so long as it is intended by the agreement to give “something equivalent” to money back to the homebuyers. The “something equivalent” in these matters is obviously the flat/apartment. Also of importance is the expression “commercial effect”. “Commercial” would generally involve transactions having profit as their main aim. Piecing the threads together, therefore, so long as an amount is “raised” under a real estate agreement, which is done with profit as the main aim, such amount would be subsumed within Section 5(8)(f) as the sale agreement between developer and home buyer would have the “commercial effect” of a borrowing, in that, money is paid in advance for temporary use so that a flat/apartment is given back to the lender. Both parties have “commercial” interests in the same—the real estate developer seeking to make a profit on the sale of the apartment, and the flat/apartment purchaser profiting by the sale of the apartment. Thus construed, there can be no difficulty in stating that the amounts raised from allottees under real estate projects

would, in fact, be subsumed within Section 5(8)(f) even without adverting to the Explanation introduced by the Amendment Act.

79. That this amendment is in fact clarificatory is also made clear by the Insolvency Committee Report, which expressly uses the word “clarify”, indicating that the Insolvency Law Committee also thought that since there were differing judgments and doubts raised on whether homebuyers would or would not be included within Section 5(8)(f), it was best to set these doubts at rest by explicitly stating that they would be so covered by adding an Explanation to Section 5(8)(f). Incidentally, the Insolvency Law Committee itself had no doubt that given the “financing” of the project by the allottees, they would fall within Section 5(8)(f) of the Code as originally enacted.

101. Section 5(8)(f) as it originally appeared in the code being a residuary provision, always subsumed within it allottees of flats/apartments. The explanation together with the deeming fiction added by the amendment act is only clarificatory of this position in law”.

Hon’ble Supreme Court in **Anuj Jain, Interim Resolution Professional for Jaypee Infratech Limited Vs. Axis Bank Limited And Others** (2020) 8 SCC 401 held as under:

“The essentials for financial debt and financial creditor

46. Applying the aforementioned fundamental principles to the definition occurring in Section 5(8) of the Code, we have not an iota of doubt that for a debt to become “financial debt” for the purpose of Part II of the Code, the basic elements are that it ought to be a disbursement against the consideration for time value of money. It may include any of the methods for raising money or incurring liability by the modes prescribed in clauses (a) to (f) of Section 5(8); it may also include any derivative transaction or counter-indemnity obligation as per clauses (g) and (h) of Section 5(8); and it may also be the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in clauses (a) to (h). The requirement of existence of a debt, which is disbursed against the consideration for the time value of money, in our view, remains an essential part even in respect of any of the transactions/dealings stated in clauses (a) to (i) of Section 5(8), even if it is not necessarily stated therein. In any case, the definition, by its very frame, cannot be read so

expansive, rather infinitely wide, that the root requirements of “disbursement” against “the consideration for the time value of money” could be forsaken in the manner that any transaction could stand alone to become a financial debt. In other words, any of the transactions stated in the said clauses (a) to (i) of Section 5(8) would be falling within the ambit of “financial debt” only if it carries the essential elements stated in the principal clause or at least has the features which could be traced to such essential elements in the principal clause. In yet other words, the essential element of disbursal, and that too against the consideration for time value of money, needs to be found in the genesis of any debt before it may be treated as “financial debt” within the meaning of Section 5(8) of the Code. This debt may be of any nature but a part of it is always required to be carrying, or corresponding to, or at least having some traces of disbursal against consideration for the time value of money.

47. As noticed, the root requirement for a creditor to become financial creditor for the purpose of Part II of the Code, there must be a financial debt which is owed to that person. He may be the principal creditor to whom the financial debt is owed or he may be an assignee in terms of extended meaning of this definition but, and nevertheless, the requirement of existence of a debt being owed is not forsaken.

48. It is also evident that what is being dealt with and described in Section 5(7) and in Section 5(8) is the transaction vis-à-vis the corporate debtor. Therefore, for a person to be designated as a financial creditor of the corporate debtor, it has to be shown that the corporate debtor owes a financial debt to such person. Understood this way, it becomes clear that a third party to whom the corporate debtor does not owe a financial debt cannot become its financial creditor for the purpose of Part II of the Code.

50. A conjoint reading of the statutory provisions with the enunciation of this Court in *Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17]*, leaves nothing to doubt that in the scheme of the IBC, what is intended by the expression “financial creditor” is a person who has direct engagement in the functioning of the corporate debtor; who is involved right from the beginning while assessing the viability of the corporate debtor; who would engage in restructuring of the loan as well as in reorganisation of the corporate debtor's business when there is financial stress. In other words, the financial

creditor, by its own direct involvement in a functional existence of corporate debtor, acquires unique position, who could be entrusted with the task of ensuring the sustenance and growth of the corporate debtor, akin to that of a guardian. In the context of insolvency resolution process, this class of stakeholders, namely, financial creditors, is entrusted by the legislature with such a role that it would look forward to ensure that the corporate debtor is rejuvenated and gets back to its wheels with reasonable capacity of repaying its debts and to attend on its other obligations. Protection of the rights of all other stakeholders, including other creditors, would obviously be concomitant of such resurgence of the corporate debtor”.

While considering the claim of land owner for designating him as a financial creditor a coordinate Bench of this appellate tribunal in **Namdeo Ramchandra Patil & Anr. vs. Vishal Ghisulal Jain RP of Corporate Debtor & Ors.**, (2022) SCC Online NCLAT 4392 held as under:

When we look into the provision of Section 5(8)(f) Explanation (i) and (ii), it is clear that pre-condition for a debt being a Financial Debt. is disbursement against the time value of money and when any amount is raised from an allotment under real estate such transaction is also covered under Section 5(8)(f). The pre-condition for application of Explanation (i) of Section 5(8)(f) is raising of an amount from allottee. The present is not a case where an amount has been raised from the Appellants - the Landowners. The submission of the Appellant that they are allottees within the meaning of Section 2(d) of RERA Act does not make their transaction as a Financial Debt. within the meaning of Section 5(8)(f). It is relevant to notice that RERA Act itself has noticed the definition of 'Promoter' under Section 2(zk). When we look in the real nature of the transaction entered between the Corporate Debtor and the Appellants - Landowners, the landowners were entitled to share the constructed area in the ratio of 45: 55 and allotment of flats and commercial units in lieu of their entitlement under the Development Agreement does not make the transaction of allotment a Financial Debt. within the meaning of Section 5(8)(f).

29. Coming to the facts of the instant case, it is reflected from the record that the appellant Company become the authorised broker of the CD vide

two agreements dated 10.04.2012 and 17.01.2013. It is also reflected from record and is also admitted to the parties that on 30.05.2012 and 20.06.2013 Rs. 50,000/- and Rs. 1,50,000/- were paid by the appellant Company towards the booking of flat no. 201 in tower-IV of one of the project of the CD and two receipts in this regard were also issued in favour of the CD. It is also reflected that Builder Buyer Agreement was executed between the parties on 10.09.2013 with regard to flat no. 1204 in Tower-V for Rs. 33,75,600/- and the money paid earlier to the CD (Rs. 2,00,000/- (Rs. 50,000/-+1,50,000/-) and brokerage fee due on CD was adjusted in the consideration of this new flat. Thereafter the CD appears to have issued two credit notes of dated 10.03.2015 and 02.07.2015 of Rs. 5,74,800/- and Rs. 10,69,585/- towards the above flat for part adjustment of commission payable by the CD to the appellant company towards brokerage fee.

30. It is also reflected that credit notes mentioned above were issued by the CD pertaining to the brokerage of the appellant company, which was due on the CD till that point of time. Thus, it is clear that up to this extent except Rs. 2,00,000/- (Rs. 50,000/-+ Rs. 1,50,000/-) no amount was paid/disbursed by the appellant company and the remaining consideration of the flat was also paid with regard to the adjustment of credit notes issued on account of the amount due of brokerage. As per the own admission of the appellant company many flats were sold by it and huge amount of the brokerage fee was due on CD in connection with the sale of these flats and an invoice of Rs. 99,77,449/- was raised by the appellant company, in this regard, on 01.10.2016.

31. It also appears to be an admitted position that flat allotted to the appellant was cancelled by the CD on 07.06.2017. It is also conspicuous that a demand notice was sent by the appellant company to the CD for an amount of Rs. 1,96,25,503/- wherein Rs. 99,77,449/- were shown payable towards commission/brokerage and Rs. 17,05,850/- were shown for refund of the unit cancelled by the CD along with up to date interest.

32. It is also evident that a petition under Section 9 of the IBC was admittedly filed by the appellant company bearing Company Petition IB No. 868 of 2018 in NCLT, Court-II, New Delhi for a default of Rs. 1,16,83,299/- (Rs. 99,77,449/- for brokerage fee +Rs. 17,05,850/- for adjustment against cancellation of flat booking) and this application was allowed by the Tribunal on 12.11.2021 and Mr. Anil Kumar Mittal was appointed as the IRP. It is also clear that appellant at that time was not staking claim for the flat allotted to it and was only inclined to claim the money deposited by it in lieu of the flat. It may be recalled at this stage that till then only Rs. 2,00,000/- were deposited by the appellant company with the CD and rest of the money claimed by him for cancellation of flat by the CD was adjusted in consideration of that flat which according to own admission of the appellant was an outstanding amount of brokerage/commission due on CD. Thus, except Rs. 2,00,000/- which appellant company claims to have deposited with the CD with regard to the allotment of a flat which was subsequently cancelled, no money was disbursed by him to the CD in lieu of the flat(s).

33. It is also an admitted fact that a settlement was held between the parties and an MoU was originally executed on 25.11.2021, a copy of this

MoU has been brought on record by the appellant himself through additional affidavit dated 25.10.2024 and perusal of it will reveal that it is admitted to the parties that only Rs. 2,00,000/- were earlier given towards the allotment of one flat (which has been cancelled subsequently) and the rest of the consideration for the two flats allotted, is shown by the adjustment of the brokerage/commission due on CD.

34. The other terms and conditions of the MoU are not important for us as the controversy before us is only with regard to the nature of the debt and not with regard to the other terms and conditions of the MoUs. Suffice is to say that settlement amount of Rs. 1,75,00,000/- was agreed between the parties and out of this Rs. 50,00,000/- were paid to the appellants by the CD and balance Rs. 1,25,00,000/- was adjusted as the consideration for allotment of two flats namely Tower-5A, 1204 and T-5, 2301 in one of the project of the appellant. Thus the money which was adjusted towards consideration of these flats was the brokerage fee which was due on the CD and no money was parted or disbursed by the appellants in lieu of these agreements for allotment of 2 flats.

35. It is also an admitted fact that another MoU dated 03.02.2022 was executed between the parties amending the terms of earlier settlement dated 25.11.2021. It is also admitted to the parties that on the basis of this settlement, on an appeal filed by the Suspended Directors of the CD, this Tribunal vide order dated 08.02.2022 set aside the order of the Ld. NCLT whereby the CIRP was initiated.

36. It is also significant to note that vide amended MoU of date 03.02.2022 the appellant company was also allotted an under construction

unit i.e. T-5A, 1204 for adjustment of Rs. 50 lakhs brokerage however the second flat remained the same as was in the MoU dated 25.11.2021. It goes without any controversy that the appellant had earlier filed an application under Section 9 of the IBC (as operational creditor) and till culmination of the CIRP of the CD by this Appellate Tribunal, he was admittedly in the shoes of an operational creditor. Nothing appears to have changed thereafter and all the facts and circumstances have remained the same.

37. A significant aspect of the matter which may also be highlighted is that for the Builder Buyer Agreement executed allegedly for allotment of two flats nothing was paid by the appellant and only the due amount of brokerage has been shown as outstanding in MoU of 25.11.2021 as amended by MoU dated 03.02.2022 as consideration of these two flats. Thus no money in fact, was paid or disbursed by the appellant to the CD as a consideration of the two flats stated to be allotted under the agreement dated 25.11.2021 as amended on 03.02.2022. Thus it is a case where absolutely no disbursement of amount, which may have commercial effect of borrowing and there appears no raising of any amount from alleged allottee (appellants).

Conclusions

38. To recapitulate all the facts, it is reflected that initially only Rs. 50,000/-+Rs. 1,50,000/- =Rs. 2,00,000/- were paid by the appellant in lieu of booking of a flat in the project of the CD, the allotment of this flat was later on cancelled by the CD on account of non-deposition of balance due. Appellant was the broker of the CD and remained involved in selling units of the CD and thus earned a huge amount which is stated to have remained

outstanding on CD as the Commission or brokerage and in adjustment of the said outstanding amount of brokerage allegedly due on CD the two flats were allotted to the appellant vide MoU dated 25.11.2021 and 03.02.2022 and only an amount of Rs. 2,00,000/- which was initially paid with regard to another unit has also been adjusted however it appears to be an admitted situation that the said unit which was allotted earlier in point to the appellants, was subsequently cancelled by the CD and thus the MoU's which were executed subsequently on 25.11.2021 and 03.02.2022 were not having any connection with the said unit which was allotted to the appellant earlier in time and cancelled thereafter.

39. Thus, even if only the facts admitted to the parties are taken into cognizance it will emerge that the two flats have been allotted to the appellant under MoU dated 25.11.2021 and 03.02.2022 only on account of adjustment of the brokerage money of the appellant which was allegedly due on the CD and therefore there was no money parted or disbursed by the appellant to the CD and in our considered opinion, the debt of the appellant which was due on the CD was only for the commission/brokerage services allegedly rendered by the appellant and no money was disbursed by the appellants to the CD for time value of the money and the appellants are also estopped to change the nature of debt pertaining to which they have earlier filed a petition under Section 9 of the IBC, admitting themselves as operational creditor.

40. Thus, keeping in view all the facts and circumstances of this case and in the background of the law discussed herein before, no illegality appears

to have been committed either by the IRP or by the Adjudicating Authority in rejecting the claim of the appellant to treat himself as financial creditor.

41. Resultantly, we do not find any force in both the appeals and the same are **dismissed** as such. There is no order as to costs.

42. Pending IA's are also disposed of accordingly.

[Justice Mohd. Faiz Alam Khan]
Member (Judicial)

[Arun Baroka]
Member (Technical)

New Delhi.
08.08.2025.

sr